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Effects of foreign debt and other related financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, submitted pursuant to Human Rights Council resolutions 25/16 and 34/3.

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Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Summary

In the present report, the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, studies the human rights implications of debt disputes being submitted to the international investment arbitration system and whether, from a human rights perspective, investment arbitration is an adequate option for solving disputes in the context of debt restructuring.

In the absence of an international framework to regulate sovereign debt restructuring, investment arbitration has recently been seen as a potential forum for holdout creditors and vulture funds to seek to enforce sovereign debt instruments. However, the system of investment arbitration was created to provide legal security for foreign direct investment and to contribute to economic development, not to enforce financial obligations, and even less to provide an avenue for the claims of speculative hedge funds and non-cooperative creditors. To date, however, most investment tribunals have found jurisdiction over sovereign debt disputes. The willingness of investment arbitrators to hear such disputes may encourage vulture funds and holdout creditors to use this form of dispute resolution, making debt restructuring longer and more costly and difficult.

Most bilateral investment treaties do not contain any explicit human rights provisions and investment arbitration tribunals have been rather reticent about encompassing human rights robustly in their decisions. Notwithstanding a few arbitration decisions, the consideration of human rights issues in international investment arbitration has so far remained rather on the periphery of the international investment law regime. Given the deep and broad human rights implications of debt crises, it would be a dangerous development if bilateral investment treaties became a forum for solving sovereign debt disputes.

While the international community is making great efforts to prevent or minimize holdout litigation, investment arbitration may open a new door for such creditors to deploy disruptive strategies. The current system of investment arbitration may therefore impair economic recovery and undermine State funding for public services and State institutions that give effect to economic, social, cultural rights and the protection of civil and political rights.

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I. Introduction

1. Bilateral investment treaties, providing legal security for foreign direct investment (FDI), may result in tensions with State obligations to protect human rights. While FDI may under certain conditions provide economic and social benefits, investment treaties often constrain the ability of States to provide adequate national regulation in relation to labour standards, the rights to health, food, water and sanitation, and expose States to compensation claims by private and public investors. They can thus have a chilling effect on States in ensuring adequate regulation of economic activity within their territories. Bilateral and multilateral investment treaties have also raised concerns in relation to the right to public participation, as many of them were negotiated in secrecy. Investment arbitration has also been criticized on procedural grounds for its lack of transparency, lack of representation of affected persons in arbitration proceedings and lack of judicial review.

2. In the present report the Independent Expert studies a particular aspect of investment arbitration: the use of investment arbitration to enforce debt payments in the context of debt restructuring and its impact on human rights.[1] He analyses the human rights implications of debt disputes being submitted to the international investment arbitration system and addresses the question of whether bilateral investment treaties have the potential to solve or exacerbate the problems associated with sovereign debt crises for debtor States. The central question he tries to answer is whether, from a human rights perspective, investment arbitration is an adequate option for solving disputes in the context of debt restructuring.[2]

3. In the event of a default, States need to determine how to manage their debt repayments while ensuring that human rights are respected within their territory. Given finite resources, States can either fully prioritize their debt repayments and withdraw financing from public services, or try to continue to provide public services whilst not fully servicing their debts. Both approaches have the potential to have a negative impact on the ability of the State to respect, protect and fulfil its human rights obligations. Obviously, both options are not usually implemented in absolute terms: States do not just unilaterally and entirely repudiate their debts based on economic distress and those that are willing to ask their population to make a great sacrifice in order to repay the debt would usually try to make efforts to protect their population from harm associated with fiscal consolidation measures.

4. What we see in practice is that State insolvency or illiquidity usually triggers negotiations between debtors and creditors, who eventually have to agree on the scope and extent of the debt reduction or reprofiling and economic reform conditions. While restoring public debt sustainability is of paramount importance, treating creditors arbitrarily or disregarding the human rights of the population cannot be considered as legitimate options.[3] On the other hand, the range of abusive, discriminatory or bad faith behaviour that both debtors and creditors can display before, during and after defaults is very rich. In such dynamic situations, balancing all applicable legal standards is a very complex and delicate task.

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[1] The Independent Expert thanks Edward Guntrip from the University of Sussex for his research work for the present report.

[2] This study on bilateral investment treaties complements reports by other human rights experts on this subject. See A/HRC/19/59/Add.5, A/69/299, A/70/301, A/HRC/33/42, A/HRC/30/44 and A/HRC/33/40.

[3] See Juan Pablo Bohoslavsky and Matthias Goldmann, "An incremental approach to sovereign debt restructuring: sovereign debt sustainability as a principle of public international law", *Yale Journal of International Law*, vol. 41, No. 2 (2016), and A/70/275.

5. While the General Assembly has recently advanced the so-called Basic Principles for Sovereign Debt Restructuring Processes (see resolution 69/319), the fact that most developed countries did not support the resolution shows the continuous failure of the international community to set up a robust, comprehensive and sustainable legal and institutional framework to deal adequately with debt restructuring. That gap makes coordination among creditors and between creditors and debtors, tortuous and with unforeseeable outcomes. The global financial crisis of 2008 and the ongoing sovereign debt crisis in several countries have put even more pressure on the global financial architecture and displayed its weaknesses.[4]

6. The typical problem in this context is described as follows: if not all creditors agree to the debt terms that the debtor State is seeking to implement, some can hold out with the aim of trying to secure a more beneficial outcome in the future. Holdout creditors can significantly slow the sovereign debt restructuring process. While debt is outstanding, it is difficult for States to get access to the markets and loss of confidence in the ability of the State to repay its debt and overcome the financial crisis will also probably lead to outflows of capital. Longer delays can therefore result in more severe economic and financial crises and in the end trigger the need for larger haircuts. Consequently, holdouts can significantly affect sovereign debt restructuring that would otherwise function in the broader interest. The risks of prolonged debt restructuring processes with unforeseeable outcomes have created a market for hedge funds, which seek to exploit the situation by purchasing outstanding debt at a considerable discount from distressed bondholders before trying to enforce the terms of the instrument to maximize their return (the so-called vulture funds).[5]

7. Given the legal and institutional void in this field, and in particular the intense activity of vulture funds in sovereign debt markets, creditors have in recent years explored alternative forums to protect their contractual rights. One of the options has been to submit debt disputes to international arbitration under the umbrella of bilateral investment treaties.[6] To put it in simple words: in the context of debt crises, creditors invoke foreign investment law to protect their right to be repaid, for which they submit claims to international arbitration. What at first sight might be seen as a practical solution can be indeed a very problematic alternative from the point of view of human rights and debt sustainability.

8. The simultaneous submission of a State to the international human rights and international investment regimes can generate a dilemma for governments, which becomes tangible when subjected to claims on both those two fronts: either the State is liable for not taking the measures that are required by human rights treaties, or it may give priority to human rights obligations and thus affect the interests of investors. To some extent, this dilemma is exacerbated by the usual practice of arbitral tribunals that are responsible for interpreting and applying the bilateral investment treaties: such tribunals consider investment treaties as paramount and

[4] Christian J. Tams, Stephan W. Schill and Rainer Hofmann, "International investment law and the global financial architecture: identifying linkages, mapping interactions", in *International Investment Law and the Global Financial Architecture*, Christian J. Tams, Stephan W. Schill and Rainer Hofmann, eds. (Cheltenham, Gloucestershire, Edward Elgar Publishing, 2017).

[5] See Human Rights Council resolution 27/30, A/HRC/14/21 and A/HRC/33/54.

[6] Since 2005, creditors have brought four claims before investment arbitration tribunals to try and enforce the terms of sovereign bonds (*Abaclat and others v. Argentine Republic*, ICSID case No. ARB/07/5, decision on jurisdiction and admissibility, 4 August 2011; *Ambiente Ufficio and others v. Argentine Republic*, ICSID case No. ARB/08/9, decision on jurisdiction and admissibility, 8 February 2013; *Alemanni and others v. Argentine Republic*, ICSID case No. ARB/07/8, decision on jurisdiction and admissibility, 17 November 2014; and *Poštová banka, a.s. and Istrokapital S.E. v. Hellenic Republic*, ICSID case No. ARB/13/8, award, 9 April 2015).

have only recently recognized in some of their decisions the potential role of human rights law.[7] This dissociation has led to certain national regulatory measures to protect human rights being classified as violations of bilateral investment treaties. Investment arbitration tribunals have imposed stiff awards to States, which, in turn, reduce further the already eroded fiscal space of States going through financial troubles.[8]

9. The present report is divided into a further six sections. In section II, the Independent Expert describes when, how and why foreign investment protection law was created, making the case that its primary purpose was to provide legal security for all stakeholders in cases of direct investment, but was not a legal regime created to handle issues of private and public debt. In section III, he critically examines the narrow interpretation of applicable law that most investment tribunals apply by not attaching serious importance to human rights law in the disputes they solve. In section IV, he addresses how bilateral investment treaties and investment standards are being or could be used to resolve sovereign debt disputes, arguing that they are not adequate to address the wider implications of sovereign debt restructurings. In section V, he further problematizes that arbitration avenue by focusing on the adverse human rights implications of using bilateral investment treaties to deal with debt restructurings. Section VI contains key findings and recommendations.

II. Origins and purposes of bilateral investment treaties: nothing to do with debts

10. Foreign direct investment is characterized by the transfer of assets by an individual or a company (foreign investor), who is a national of one State (home State) into the territory of another State (host State), with a view to long-term economic benefit.[9] Prior to the existence of bilateral investment treaties, foreign investors, as aliens in the host State, were protected by the customary international minimum standard, which was enforced through diplomatic protection. That system did not generate significant protection for foreign investors. Not only was there a high threshold for establishing a violation of the customary standard, but also whether the host State chose to espouse the foreign investor's claim using diplomatic protection was a matter of discretion and subject to political influence.

11. The process of decolonization triggered the introduction of treaties that were dedicated to the protection of foreign investors. Many newly decolonized States were dissatisfied with the manner in which they had been economically exploited

[7] See the statement of the tribunal in *CMS Gas Transmission Company v. Argentine Republic*, ICSID case No. ARB/01/8, award, 12 May 2005. Argentina sought to rely on the constitutional standing of human rights treaties in its Constitution to justify their application in the dispute. In paragraph 121, the tribunal stated that "there is no question of affecting fundamental human rights when considering the issues contemplated by the parties." See also *Bernhard von Pezold v. Republic of Zimbabwe*, ICSID case No. ARB/10/15, award, 28 July 2015, procedural order No. 2, 26 June 2012, in which the tribunal rejected an amicus curiae submission, arguing that indigenous rights were irrelevant to the claim, before relying on the prohibition of racial discrimination in favour of the foreign investor.

[8] See *Saur International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, decision on jurisdiction and liability, 6 June 2012; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID case No. ARB/03/19, decision on liability, 30 July 2010. See also Juan Pablo Bohoslavsky and Juan Justo, "The conventionality control of investment arbitrations: enhancing coherence through dialogue", *Transnational Dispute Management*, vol. 10, No. 1 (2013). On the more general issue of the increasing loss of policy space in the past 15 years due to free trade agreements and bilateral investment treaties, see Rick Rowden, "The case for policy space", *The Mint*, Issue 2 (June 2017).

[9] See *OECD Benchmark Definition of Foreign Direct Investment*, 4th ed. (Paris, OECD, 2008).

during the colonial period and objected to the continuation of pre-existing concession agreements with what were now foreign investors.[10] To assert their economic independence (in addition to their political independence) newly decolonized States commenced expropriating foreign-owned investments. In the wake of expropriations and the legal uncertainty generated by debates in the United Nations regarding the legal rights of foreign investors, bilateral investment treaties were introduced to provide legal certainty. It needs to be recalled that the International Centre for Settlement of Investment Disputes was established in 1965 by the World Bank as an instrument to promote foreign investments. Later, with the implementation of the Washington Consensus and the global promotion of foreign investment, bilateral investment treaties became a widespread instrument for protecting foreign investors. Over the past 25 years, bilateral investment treaties have become entrenched as the main instrument in international law to protect FDI. Currently the international investment regime consists of nearly 3,000 bilateral investment treaties and over 350 multilateral treaties with investment provisions.[11]

12. In that context, it is not surprising that the so-called Salini test[12] was for a long time broadly used by arbitrators to identify whether a transaction could be considered as FDI for the purposes of article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The test requires a contribution of money or assets to be a long-term investment; involve business risk; be in the territory of the host State; the foreign investor must be involved in the management of the investment; and it has to contribute to the economic development of the host State. In general terms, the Salini test has been seriously used by arbitrators to determine whether the transaction in question displays the characteristics of FDI. That is in line with the development terms of the ICSID Convention, upon which it was originally based. However, without substantial reforms of bilateral investment treaties, arbitrators are now much more open to considering pure financial obligations as protected by bilateral investment treaties.

13. In theory, bilateral investment treaties create legal certainty for foreign investors by conferring protection on investors and investment projects through both substantive protections and procedural rights. Bilateral investment treaties are structured so that the host State owes obligations to the home State, which are directly enforceable against the host State by the foreign investor. The substantive rights conferred indirectly upon the foreign investor relate to the protection of property (requiring compensated expropriation), legal rights (fair and equitable treatment), security (full protection and security) and non-discrimination (national treatment and most-favoured nation). Foreign investors commence legal proceedings by initiating a claim based on the standing offer by the host State of investment arbitration (sourced usually in a bilateral investment treaty or domestic legislation).

14. While primarily aimed at investor protection, bilateral investment treaties are also tools for the manifestation of political and economic ideologies. During the 1980s and 1990s, the terms of bilateral investment treaties reflected the Washington Consensus and its neoliberal policies. A market-driven approach to the allocation of FDI was manifested in bilateral investment treaties containing high levels of

[10] See Edward Guntrip, "Self-determination and foreign direct investment: re-imagining sovereignty in international investment law", *International and Comparative Law Quarterly*, vol. 65, No. 4 (October 2016).

[11] See United Nations Conference on Trade and Development (UNCTAD), international investment agreements navigator, available from http://investmentpolicyhub.unctad.org/IIA.

[12] See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID case No. ARB/00/4, decision on jurisdiction, 23 July 2001.

investment protection as an inducement to foreign investors. In the 1990s, the introduction of the North American Free Trade Agreement saw investment disputes arise between developed States. In response, developed States narrowed the interpretation of investment protection standards to minimize their exposure to claims. Since 2000, the provisions of bilateral investment treaties have been gradually adjusted to take into account both legal and political developments.[13]

15. Two assumptions underpin the structure of bilateral investment treaties. The first is that the foreign investor needs protection from the host State during the post-establishment phase of the investment. Once the foreign investor has invested in the host State, he is subject to the exercise of sovereign power by the host State, which could be used in an arbitrary or discriminatory manner. Given the scale and duration of FDI projects, potentially adverse host State conduct generates risk. Investment protection standards are intended to minimize that risk by enabling a foreign investor to challenge the exercise of State power that violates investment protection standards. The second assumption is linked to the first. To induce foreign investors to enter their jurisdiction, States need to offer protection, as evidence that they are not going to act in an arbitrary or discriminatory manner. In theory, the higher the level of protection a State offers, the lower the risk for the foreign investor and the more desirable the State becomes as a location for foreign investment. However, this assumption is questionable based on empirical studies of FDI flows.[14]

16. Bilateral investment treaties provide for specialist dispute resolution in the form of investment arbitration, which was created as a supposedly apolitical forum to counter the perception of bias in the courts of host States. Modelled on international commercial arbitration and traditional forms of inter-State arbitration, its procedures can be governed by specialist investment arbitration rules or the procedural rules that govern international commercial arbitration. Similarly to international commercial arbitration and inter-State arbitration, investment arbitrators are appointed by the parties on an ad hoc basis. Furthermore, in line with practices from both forms of arbitration, investment arbitration has traditionally been confidential. The private aspects of investment arbitration have evolved to reflect the fact that investment arbitration is a matter of public interest. Measures to increase public involvement in investment arbitration include increased transparency and the introduction of amicus curiae submissions that can enable the public interest to be represented.

17. Nevertheless, it should be noted that affected third-party actors, such as resident populations affected by foreign investments, often have no adequate standing in investment arbitration and only limited opportunities for participation. Arbitration proceedings are in most cases conducted in camera, preventing affected third parties from following them. While amicus curiae submissions have become an avenue for considering public interests in investment arbitration, they have not been able to overcome the legitimacy crisis that the system of international investment law is facing.

[13] See Edward Guntrip, "Systemic integration and international investment law" in *Select Proceedings of the European Society of International Law, Volume 3 2010*, James Crawford and Sarah Nouwen, eds. (Oxford, Hart Publishing, 2012).

[14] See, for example, Mary Hallward-Driemeier, "Do bilateral investment treaties attract FDI? Only a bit and they could bite" in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, Karl P. Sauvant and Lisa E. Sachs, eds. (Oxford, Oxford University Press, 2009); Lauge Skovgaard Poulsen, "The importance of BITs for foreign direct investment and political risk insurance: revisiting the evidence" in *Yearbook on International Investment Law and Policy 2009/2010*, Karl P. Sauvant, ed. (Oxford, Oxford University Press, 2010).

18. In sum, given the long-term nature of the investment involved and the high costs incurred by the foreign investor, it was considered necessary for investors to be granted the investment protection standards set out in bilateral investment treaties. That system, even with all its serious imperfections, was created to deal with problems related to direct investment, not financial transactions. Furthermore, the preamble of the ICSID Convention was never intended to protect, for example, speculative hedge funds, as it establishes that the purpose of ICSID is the fostering of economic development by way of encouraging private investment.[15]

19. Furthermore, even considering that a large number of bilateral investment treaties cover not only FDI but also portfolio investments, it is striking that the expansive interpretation of bilateral investment treaties, consisting of claiming that debt disputes should, in the context of debt restructuring, be submitted to investment arbitration, bypasses the entire global financial architecture and pertinent legal standards. Is it legitimate that multilateral financial institutions, public and private creditor representatives and taxpayers are not even heard in a process that will determine a debt restructuring, or that an investment tribunal dealing with this kind of case does not even consider principles such as debt sustainability?

III. Investment law and human rights: an unacceptably narrow view

20. Despite the increasing scope of bilateral investment treaties and investment arbitration covering sensitive economic and social areas affecting human rights, the rulings by arbitrators have so far accorded not much weight to human rights treaties.[16] Arbitration tribunals have occasionally made reference to human rights obligations, but rarely apply them directly. That can be attributed to a narrow understanding of what should be considered applicable law.

21. One reason is that so far bilateral investment treaties have included hardly any express references to human rights. Some bilateral investment treaties include references for investors to respect the core labour rights enumerated in the ILO Declaration on Fundamental Principles and Rights at Work.[17] However, none of the model bilateral investment treaties used by China, France, Germany, the United Kingdom of Great Britain and Northern Ireland or the United States of America mention human rights. Although the Guiding Principles on Business and Human Rights (A/HRC/17/31) emphasize that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts", the vast majority of bilateral investment treaties currently in force do not include any explicit human rights safeguards.

22. The lack of express provisions addressing human rights in investment treaties should not prevent arbitrators from applying international human rights law. Firstly, States can potentially defend measures aimed at protecting the rights of their population by relying on provisions contained in many investment treaties protecting their regulatory powers, such as general clauses included in some investment treaties that provide a host State with the right to adopt measures to

[15] See Alex Grabowski, "The definition of investment under the ICSID Convention: a defense of Salini", *Chicago Journal of International Law*, vol. 15, No. 1 (2014).

[16] See Susan Karamanian, "The place of human rights in investor-state arbitration", *Lewis & Clark Law Review*, vol. 17, No. 2 (2013); and Pierre-Marie Dupuy and others, eds. *Human Rights in International Investment Arbitration* (Oxford, Oxford University Press, 2009).

[17] See, for example, article 13 of the 2012 model bilateral investment treaty of the United States.

protect security, human life, labour rights, public health or the environment.[18] Secondly, international investment law is part of public international law and, as such, should take into account other obligations in public international law, including human rights. Indeed, according to article 31 (3) (c) of the Vienna Convention on the Law of Treaties, article 42 of the ICSID convention and the general clauses incorporated in many bilateral investment treaties, arbitrators should not only consider the text of investment treaties, but also "any relevant rule of international law applicable in the relation between the parties". It has therefore been argued that article 31 (3) (c) of the Vienna Convention provides an important entry point for a systematic integration of human rights into investment arbitration.[19]

23. Core human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights enjoy very widespread ratification. In most cases, they count as applicable international law for both States parties to bilateral investment treaties and would thus allow arbitration tribunals to consider human rights issues in the context of investment disputes. If States are not party to a human rights treaty, recourse can be made to the concept that core human rights norms are considered as entailing *erga omnes* (towards everyone) obligations, binding on all States, as there is a universal and undeniable interest in the protection of those rights. Their applicability is therefore comprehensive. Investors cannot reasonably expect to be protected by instrumental bilateral treaties from *erga omnes* obligations grounded in multilateral substantive human rights treaties.

24. As multilateral human rights treaties demand a widespread acknowledgement of the obligations established by them, it could not be lightly presumed that a State concluding a bilateral investment treaty would place itself in breach of obligations owed to the international community as a whole. As the normative conflict discussed here is at the heart of the relations between investors and host debtor States, a systemic integration of international law has to be sought. The underlying deliberative approach of those norms requires an openness towards interpreting "different rationalities of various segments of financial regulation", as monetary, fiscal, banking and development policies are intrinsically interlinked.[20]

25. When solving a dispute between a State and an investor that involves human rights, the arbitral panels must account for the interaction of the two legal regimes involved in their analysis, without displacing either of them. The basic guideline for reasonably managing that interaction is to find interpretations of the bilateral investment treaty that are compatible with human rights obligations and vice versa. There is a need for coherence, in order to avoid the fragmentation of an international legal order that aspires to legality and, consequently, to consistency. While a few recent investment tribunals have started to refer to human rights as part of their decisions, that is not yet a widespread or consolidated practice.[21]

26 Many early investment tribunals were reluctant to extend their jurisdiction to encompass human rights. That can be attributed to the limited jurisdiction of investment tribunals, in particular those conducted in accordance with the ICSID Convention that limits jurisdiction to "any legal dispute arising directly out of an

[18] See, for example, the 2004 Canada model bilateral investment treaty, arts. 10 and 11.

[19] See Bruno Simma, "Foreign investment arbitration: a place for human rights?", *International and Comparative Law Quarterly*, vol. 60, No. 3 (July 2011).

[20] See Matthias Goldmann "International investment law and financial regulation: towards a deliberative approach", in *International Investment Law and the Global Financial Architecture*.

[21] See *Hesham T. M. Al Warraq v. Republic of Indonesia*, United Nations Commission on International Trade Law, final award, 15 December 2014; *Philip Morris Brands Sàrl and Abal Hermanos S.A v. Oriental Republic of Uruguay*, ICSID case No. ARB/10/7, 8 July 2016.

investment" (art. 25). However, investment tribunals have dismissed the significance of human rights or have downplayed the potential for treaty conflicts between obligations sourced in bilateral investment treaties and human rights instruments.[22] Other tribunals have used human rights inconsistently to support the claims of foreign investors.[23] The most recent decision to address human rights in investment arbitration was in the case of *Urbaser v. Argentina*.[24] The investment tribunal integrated human rights into its decision by considering how human rights obligations affected the operation of the fair and equitable treatment standard, applied to the defence of necessity, and found jurisdiction over a human rights-based counterclaim. As such, the award is the most comprehensive with regard to the way in which it addresses the intersection of human rights and international investment law. The decision proves that some investment arbitrators may be willing to adopt an approach to investment arbitration that is open to human rights. However, it is controversial, given the manner in which the tribunal sought to confer human rights obligations directly on the foreign investor.[25] It is therefore unclear at this stage whether that award will be used in the future as a precedent for opening investment arbitration to a thorough consideration of applicable human rights norms.

27. Thus, while human rights are beginning to be recognized as relevant components of bilateral investment treaties, they are a long way from being entrenched. Consequently, the use of human rights in international investment law remains on the periphery of the legal regime.

28. Recent model bilateral investment treaties are beginning to introduce more flexible investment protection standards recognizing human rights. The 2016 India model bilateral investment treaty includes provisions that seek to protect human rights and confer obligations on home States,[26] but it has yet to be seen how it will be received by other States. The Comprehensive Economic and Trade Agreement between Canada and the European Union, which is awaiting ratification by European Union member States, also includes references to human rights in its preamble. The level of human rights protection it offers has nevertheless been the subject of critiques by human rights bodies.[27]

29. Despite such developments, existing bilateral investment treaties will bind States for a significant period of time and may still apply even when States withdraw from them, owing to the inclusion of sunset clauses.[28] For the vast majority of future investment disputes, there will therefore be no explicit textual foundation in bilateral investment treaties that will force an investment tribunal to discuss relevant human rights obligations.

[22] See, for example, *CMS Gas Transmission Company v. Argentine Republic*.

[23] See, for example, *Bernhard von Pezold v. Zimbabwe*.

[24] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia v. Republic of Argentina*, ICSID case No. ARB/07/26, award, 6 December 2016.

[25] See Edward Guntrip, "*Urbaser v Argentina*: the origins of a host state human rights counterclaim in ICSID arbitration?", *EJIL: Talk!*,10 February 2017.

[26] See articles 12 (1) (v) and 13.

[27] See, for example, Commission national consultative des droits de l'homme (France), "Let us not sacrifice human rights for commercial interests", 15 December 2016.

[28] That is the case for States such as Poland. See Agnieszka Zarowna, "Termination of BITs and sunset clauses — what can investors in Poland expect?", available from http://kluwerarbitrationblog.com/2017/02/28/booked-22-february-polish-bits/.

IV. Debt disputes in investment arbitration

30. Holdout creditors have started to use investment arbitration to seek to enforce the terms of their sovereign debt instruments. While there had already been other awards establishing that pure financial transactions qualified as investments,[29] the leading jurisprudence stems from the sovereign debt crises in Argentina.[30] These decisions seem to encapsulate the idea that the arbitrary use by States of their sovereign power to change the terms of their financial obligations towards creditors may constitute a treaty violation.[31] There is a need, however, to understand fully by whom, how and why these contractual terms have been modified. It is then disappointing to see that in those decisions with multiple ramifications, no consideration has been given to whether a supermajority of creditors have agreed on the new terms. As they were jurisdictional decisions rather than decisions on the merits (although once jurisdiction was established, some of the claims were settled), we missed the opportunity to see whether the arbitration tribunal would have been ready to consider whether their decision would leave sufficient fiscal space to the borrowing State to fulfil its human rights obligations towards its own population. However, those jurisdictional decisions may encourage holdout creditors not to participate in debt restructuring processes, but to claim full repayment instead by suing sovereign debtors in arbitration tribunals. The decisions have set unfortunate precedents that are not in the broader interest, permitting minority creditors to challenge investment arbitration debt restructuring agreed by supermajorities of creditors.[32]

31. On the other hand, in *Poštová Banka v. Greece* (2015), the tribunal held that sovereign bonds were not within the scope of the Slovakia-Greece bilateral investment treaty, based on the main argument that the contested sovereign debt would not fall under the definition of investment in the treaty.[33] As a result, the tribunal argued that it did not have jurisdiction to hear the claim. Compared to the decisions on Argentina described in the previous paragraph, the rather ambivalent manner in which investment arbitrators dealt with the claims against Greece is instructive, as it exemplifies how far inconsistency can find its way into investment arbitration.

32. In any case, these decisions are proof of how the scope of investment arbitration has expanded, how investment arbitrators can interpret terms found in bilateral investment treaties very broadly and, in so doing, may limit crucial policy choices made by States. Given that the tribunals mentioned above appeared to be unaware of the broader context in which sovereign debt operates, the awards also demonstrate that investment arbitration often fails to take into account considerations beyond investment protection.

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[29] See, for example, *Fedax N.V. v. Republic of Venezuela*, ICSID case No. ARB/96/3, decision on objections to jurisdiction, 11 July 1997; *Ceskoslovenska Obchodni Banka v. the Slovak Republic*, ICSID case No. ARB/97/4, decisions on objections to jurisdiction, 24 May 1999 and 1 December 2000.

[30] See *Alemanni and others v. Argentine Republic*, *Ambiente Ufficio and others v. Argentine Republic*; and *Abaclat and others v. Argentine Republic*. Despite the sovereign bonds being purchased on the secondary market, a territorial connection was established because, for financial instruments to be present in the territory, the funds only have to be made available to the host State (see also note 13).

[31] Charles N. Brower, and Alexandra Goetz-Charlier, "International investment arbitration and the global financial system: are they 'yin' and 'yang' or like oil and water?", in *International Investment Law and the Global Financial Architecture*.

[32] Felipe Suescun de Roa, "Investor-state arbitration in sovereign debt restructuring: the role of holdouts", *Journal of International Arbitration*, vol. 30, No. 2 (2013).

[33] ICSID case No. ARB/13/8, award, 9 April 2015.

33. If jurisdiction is established, then sovereign debt disputes may give rise to potential liability under investment protection standards. No investment award has yet dealt with those standards, so it remains unclear what approach might be taken. However, some of the possible interpretations of those standards will now be dealt with in turn.

34. Under most-favoured nation and national treatment clauses included in investment treaties, a host State cannot discriminate between different foreign investors or between foreign and national investors. As a result, national treatment clauses could oblige the bond-issuing State to grant foreign bondholders no less favourable treatment than domestic bondholders. The most-favoured nation standard could oblige the bond issuer to allow foreign bondholders to benefit from the most favourable treatment granted to third-country bondholders.[34] That may be problematic, as domestic bondholders often receive better treatment than foreign investors, in order to increase liquidity in the national economy and prevent outflows of foreign exchange.[35] Liability, therefore, may still arise in bilateral investment treaties with annexes that limit disputes to such standards.

35. Expropriation clauses in investment treaties prevent States from taking property of a foreign investor, either directly or indirectly, for a public purpose, without providing compensation. It could be argued that the exchange of bonds gives rise to an indirect expropriation, owing to their reduction in value, or that it interferes with the investor's legitimate expectations of payment. In particular, "take it or leave it" deals may involve a substantial deprivation.[36] The issue of whether contractual rights are subject to expropriation remains open.[34] Establishing that sovereign debt restructuring is for a public purpose may therefore be hard if it is considered a commercial transaction, as arbitration panels have sometimes ruled.[37] In contrast, State acts are subject to expropriation claims.[34]

36. Sovereign debt exchanges may violate the fair and equitable treatment standard on the basis that the swap undermines the stability of the legal framework of the host State and could also breach the legitimate expectations of a creditor.[34] The sovereign debt restructuring could also lack the required degree of transparency. If a "take it or leave it" approach is used, that could violate due process and not be in good faith. Given the expansive interpretation given to the fair and equitable treatment standard, if the foreign investor has developed a reasonable expectation of payment based on State conduct, liability may ensue.

37. The so-called umbrella clauses in bilateral investment treaties provide that a breach of a contractual obligation can simultaneously violate the provisions of such a treaty. They very often cover breaches of additional obligations undertaken by the host State, for example obligations included in national legislation. Bilateral investment treaties lay down standards of treatment rather than obligations. In order to establish a violation of a bilateral investment treaty, there needs therefore to be a

[34] See Michael Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge, Cambridge University Press, 2011).

[35] See Anna Gelpern and Brad Setser, "Domestic and external debt: the doomed quest for equal treatment", *Georgetown Journal of International Law*, vol. 35, No. 4 (2004); and UNCTAD, IIA Issues Note No. 2 "Sovereign debt restructuring and international investment agreements", July 2011.

[36] See Alison Wirtz, "Bilateral investment treaties, holdout investors, and their impact on Grenada's sovereign debt crisis", *Chicago Journal of International Law*, vol. 16, No. 1, (2015).

[37] See Youngjin Jung and Sangwook Daniel Han, "Sovereign debt restructuring under the investor-state dispute regime", *Journal of International Arbitration*, vol. 31, No. 1 (2014). On this issue see also Tomoko Ishikawa, "Collective action clauses in sovereign bond contracts and investment treaty arbitration — an approach to reconcile the irreconcilable", *Accounting, Economics, and Law: A Convivium*, vo. 4, No. 2 (July 2014).

violation of the contract that also breaches investment protection standards. It could be argued that when a creditor accepts new contractual terms under a collective action clause, the new terms would be legally binding as supermajorities can accept haircuts applicable to every creditor. An alternative view is that, as sovereign debt restructuring is a sovereign act, a contractual breach is capable of amounting to a violation of a bilateral investment treaty standard, which will not be protected by a collective action clause.[38] However, most sovereign debt is governed by the municipal law of a foreign financial centre and not international law. The application of such a clause might therefore be limited if another body has exclusive jurisdiction to deal with the dispute. Alternatively, the use of investment arbitration may deny exclusive jurisdiction clauses in contracts.[39] How that relationship will be addressed is unclear at this point.

38. Another example showing that investment law is not well equipped to deal with debt disputes are the defences of force majeure and necessity, which have neither in theory nor in practice been acknowledged as legal concepts that may be useful for solving claims in the context of debt restructuring.[39]

39. Those defences could, at first sight, apply in instances where a State has suffered a financial collapse and would permit a State to justify non-compliance with its sovereign debt obligations to ensure the maintenance of human rights standards. However, force majeure cannot really be invoked by sovereign debtors. Article 23 of the International Law Commission articles on responsibility of States for internationally wrongful acts provides for the force majeure defence that the respective act of the State must have been caused by an irresistible force, have been unexpected and beyond the control of the State. However, article 23 also establishes that States cannot rely on force majeure arguments if the situation is due, either alone or in combination with other factors, to the conduct of the State invoking them. In addition, the commentary to article 23 specifies that "*force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis".[40]

40. Along the same lines, article 25 of the articles on the responsibility of States for internationally wrongful acts establishes that necessity cannot be invoked as a defence if the State has contributed to the situation of necessity, or if the act in question is not the only way for the State to safeguard an essential interest against a grave and imminent peril. It is enough for creditors to allege that debt restructuring should have happened earlier, or later, or in a different manner, to make the case that the State contributed to the problem or had other options. Tribunals would have to engage in a discussion on speculative counterfactual scenarios just to see whether an insolvent State could restructure its debt to regain sustainability.

41. Invoking force majeure and state of necessity does not encompass the complexities that financial and economic crises entail. It is not surprising that financial necessity has been successfully invoked in investment arbitrations to an extremely limited extent. Only a few early international cases, heard before the

[38] See UNCTAD IIA Issues Note No. 2 "Sovereign debt restructuring and international investment agreements"; and Ellie Norton, "International investment arbitration and the European debt crisis", *Chicago Journal of International Law*, vol. 13, No. 1 (2012).

[39] See *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID case No. ARB/03/19, decision on liability, 30 July 2010.

[40] See Yearbook of the International Law Commission 2001, vol. II, part 2.

Permanent Court of International Justice, acknowledged the value of force majeure as a general principle of law in the context of debt disputes.[41]

42. The inadequacy of the defence of necessity or force majeure for solving debt disputes becomes further apparent if one considers that article 27 of the articles on the responsibility of States for internationally wrongful acts suggests that the defence of force majeure and necessity can no longer be relied upon, as soon as the state of necessity has ceased to exist. In other words, the duty to comply with treaty obligations would revive after a financial crisis has been resolved. The same article also suggests that, even if non-compliance during a state of necessity can be justified, the question of compensation for any material loss caused remains to be settled independently. Even if a State manages to successfully invoke these defences in order to renegotiate its debt with its creditors and reduce its debt to a sustainable level, discussions with creditors should be resumed once the debt crisis is over, thus returning to the problematic starting point.

43. What this analysis shows is that the terms of bilateral investment treaties and the investment standards developed by arbitrators over the last decades just do not match up with debt restructuring. Investment arbitration was not designed to deal with creditors seeking to enforce sovereign bonds and does not have institutional competence to determine the ability of a State to repay its debt following default.[42] That is because the bilateral investment treaty system protects individual property claims against the State, instead of attempting to create an effective distribution of assets with regard to the interests of other claimants. If bilateral investment treaties were intended to act as a form of insolvency law for States, they would include express provisions addressing elements of insolvency and bankruptcy laws, such as provisions regarding the consolidation of claims, attachable property etc.[43] Hence, the teleology of investment arbitration, combined with its implementation in the awards to date, provides evidence that investment arbitration is not capable of addressing the wider implications of sovereign debt restructuring.

44. To summarize the arguments presented in the present section, most investment arbitration tribunals that have been confronted with the issue have held that disputes over sovereign debt are within their jurisdiction. The most recent award based on the Slovakia-Greece bilateral investment treaty is suggestive of a change of approach, but the tribunal was interpreting different terms. The logic employed by most investment tribunals seems to extend the operation of this form of dispute resolution beyond its original remit. The willingness of investment arbitrators to hear debt disputes may encourage holdout creditors to use them for dispute resolution. Should those claims be successful at the merits stage, there may be large repercussions for the liability of a host State that has undertaken a debt restructuring. All this delays and even obstructs collective debt restructuring processes. In addition to the immediate economic implications of this type of decision, there are also potentially large-scale human rights implications that will be discussed in the next section.

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[41] See in detail this discussion in Anastasios Gourgourinis, "Financial crisis as a *force majeure* under international law and EU law: defending emergency measures, à la européenne, in investment arbitration under intra-EU BITs", in *International Investment Law and the Global Financial Architecture*.

[42] See Alison Wirtz, "Bilateral investment treaties, holdout investors, and their impact on Grenada's sovereign debt crisis"; Ellie Norton, "International investment arbitration and the European debt crisis", and Michael Waibel, *Sovereign Defaults before International Courts and Tribunals*.

[43] Robert M. Ziff, "The sovereign debtor's prison: analysis of the Argentine crisis arbitrations and the implications for investment treaty law", *Richmond Journal of Global Law and Business*, vol. 10, No. 3 (2011).

V. Bilateral investment treaties, debt restructuring and human rights

45. Sovereign debt crises have immediate economic implications for States. They can result in currency collapses, the economy shrinking and inflation spikes. The banking system may also collapse. In that context, States find it very hard to develop the economy or attract FDI. The social impact on the population can be dramatic. Wages are likely to shrink and the price of imported goods increases, reducing spending power. Unemployment and economic inequality increase. Public services frequently cease to function adequately and more people become impoverished.[44] If debtor States can no longer finance essential public services and institutions, protecting the right to health, education, housing and social or physical security, human rights are severely undermined. The effective functioning of law enforcement agencies and judicial institutions is frequently affected as well, owing to lack of staffing and funds. The success of debt restructuring is not only determined by the restoration of debt sustainability, but an assessment must be made as to whether the debt restructuring has minimized the social and human cost of a financial crisis.

46. It is necessary to contextualize the manner in which debt restructuring functions to ensure adequate human rights protection in such situations. Consideration needs to be given to the diversion of national income from social and economic expenditure to debt servicing.[45] The loss of control by governments over their fiscal policy through lending conditionalities must also be acknowledged. There is a need to analyse how such conditionalities, including the required financial consolidation efforts, may undermine the ability of a State to respect, protect and fulfil human rights. That requires a shift away from the palliative approach currently adopted in the financial sector. It also requires recognition that creditor States have extraterritorial human rights obligations. Furthermore, the articles of agreement of international financial institutions cannot be used as an excuse by States to preclude them from considering human rights. When determining the scope of restructuring and haircuts, international financial institutions and governments facing a financial crisis need to ensure that sufficient resources are at their disposal to ensure that the State concerned can adequately fulfil its human rights obligations.

47. Such considerations have informed international debt relief initiatives, such as the heavily indebted poor countries and multilateral debt relief initiatives of the International Monetary Fund and the World Bank, which linked debt relief to poverty reduction. While they are a positive development, in that they provide a departure from the pre-existing system, the contribution of those programmes to poverty reduction and ensuring debt sustainability has been limited and not all creditors have participated, so the scheme can still be open to vulture funds and holdouts. Despite those limitations, this regime emphasizes that there should be orderly debt restructuring that prioritizes the social and economic functions of the debtor as a provider of public goods and services.

48. Currently, a number of countries that have received debt relief under the above-mentioned initiatives are again facing sovereign debt crises owing to overborrowing on the commercial markets. The push towards private financing and blended financing in the 2030 Agenda for Sustainable Development will compound

[44] See, for example, A/HRC/31/60/Add.2 and A/HRC/34/57/Add.1.

[45] Celine Tan, "Life, debt and human rights: contextualizing the international regime for sovereign debt relief" in *Poverty and the International Economic Legal System: Duties to the World's Poor*, K. Nadakavukaren Schefer, ed. (Cambridge, Cambridge University Press, 2013).

this, as governments are now being pushed towards looking for "innovative and private forms of financing" at a time when there is a decline in public financing for global public goods and public services. Without reducing unsustainable debt, progress in realizing the Sustainable Development Goals and economic, social and cultural rights, including the right to development, will be severely undermined.

49. Given the vague and open texts of bilateral investment treaties, the expansive way in which international arbitrators interpret investor rights, their limited background in non-commercial matters[40] and their limited accountability, investment arbitration does not easily fit into a framework that integrates human rights and social and economic sustainability. Instead, it is likely to slow down sovereign debt restructuring by providing an accessible forum for holdout creditors and vulture funds, which will be a disincentive to negotiated settlements. The longer the process takes, the more damaging it is to debtor States. Delays draw more capital away from States, which again detrimentally affects the realization of human rights in the countries concerned. In addition, international financial institutions can hardly participate in investment proceedings, as they cannot be sued nor sue under the terms of bilateral investment treaties.

50. Investment arbitration has so far failed to recognize the broader context in which debt restructuring operates. Asset-based definitions of investment have encouraged the majority of investment tribunals to establish jurisdiction over sovereign bonds. Should a decision proceed to the merits, vague investment protection standards could give rise to debtor State liability for actions taken as part of debt restructuring. Liability may arise under several investment protection standards, especially as collective action clauses are unlikely to provide full protection against legitimate actions taken by the State in its capacity as a sovereign power: collective action clauses do not protect sovereign debtors against manipulative use of majorities by a reduced number of powerful creditors. The risk is that investment tribunals may simply rule that debtor States which fail to pay back 100 per cent of their debt to all their creditors remain liable for all of their debt, eroding further the fiscal space of States in economic difficulties.

51. In addition, courts and arbitrators have been reluctant to admit and support in their decisions the state of necessity defence, even if the State concerned is facing extreme social and economic problems while dealing with debt restructuring.[41]

52. Investment arbitration may limit the fiscal and policy space of a State and exacerbate the effects of a debt crisis. It may prevent reforms from being implemented to tackle the roots of the problems that led to the default. Investment arbitration "creates profound tension between the powerful need for reform and the prospect of significant liability. The more severe the crisis, the more likely that reform is necessary. Yet, the more profound the reform, the more likely that investors will initiate investment treaty claims".[43]

53. Investment tribunals have so far been rather reluctant to consider human rights when deciding disputes between creditors and defaulting States. As set out above, human rights are not entrenched within investment arbitration and the texts of most bilateral investment treaties are rather weak on human rights. It is therefore unlikely that detailed and robust consideration will regularly be given to, for example, the

[40] One of the main reasons for this approach relates to the legal culture of commercial arbitration, which dominates the investment arbitration community: the commercial mindset emphasizes private law obligations and in particular the importance of contractual obligations. This legal culture is considerably influenced by the two parties to the particular legal dispute and tends to downplay the role of public interest (including the role of human rights issues). See Moshe Hirsch, "Investment tribunals and human rights: divergent paths", in *Human Rights in International Investment Arbitration*.

International Covenant on Economic, Social and Cultural Rights or the Basic Principles on Sovereign Debt Restructuring Processes, which include key principles, such as debt sustainability, majority rule, human rights and the prevention of abusive behaviour. Furthermore, the failure of investment tribunals to consider sovereign bonds as distinguishable from commercial bonds proves that they do not take into account State obligations as part of the decision-making process.

54. A human rights-compliant approach to solving debt problems is likely to be undermined by holdout creditors and vulture funds, which access investment arbitration in order to enforce the terms of their sovereign bonds. Investment arbitration is not legally or institutionally equipped to fulfil that role and the practices of investment arbitrators are unlikely to permit the wider context of debt restructuring (including the human rights implications) to influence their decision-making. The result could be increased power for holdout creditors and vulture funds, increased liability for debtor States and associated with this a higher risk that human rights are undermined in debtor States.

55. In theory, bilateral investment treaties can be interpreted in a manner that is mindful of the need for financial stability and broader macroeconomic and social goals. However, in practice, arbitrators will be unlikely to surpass the technical corset of bilateral investment treaties to address adequately the complex and comprehensive questions that debt restructuring entails, including finding human rights-compliant solutions to financial crises.

VI. Conclusions and recommendations

A. Conclusions

56. **In the absence of an international framework to regulate sovereign debt restructuring, investment arbitration has been seen as a potential forum for holdout creditors and vulture funds for seeking to enforce sovereign debt instruments. That goes against the fact that investment arbitration was created to protect FDI and productive investment, with the aim of promoting economic development. The system of investment arbitration was not designed to deal with financial obligations, nor to provide protection for the claims of speculative hedge funds and non-cooperative creditors. However, to date, most investment tribunals have found jurisdiction over sovereign debt disputes, despite the unique context in which debt restructuring takes place. The willingness of investment arbitrators to hear such disputes may encourage vulture funds and holdout creditors to use this form of dispute resolution.**

57. **In purely economic terms, bilateral investment treaties do not contain standards or guidelines to make it possible to judge debt restructuring holistically, nor do they deal with the collective action problems that lie at the heart of any bankruptcy process. On the contrary, creditors will be tempted to ride free by withholding their contribution to the collective undertaking, while enjoying the benefits of the effort of all the other creditors. "It is not among the purposes of investment law to facilitate the unfair treatment of some investors (those who accept bond exchange offers) to the benefit of the other investors in the same situations (those who chose to litigate). Hence, the FET [fair and equitable treatment] standard should only protect investors against unfair sovereign debt workout procedures, for example against non-transparent and inaccessible negotiations, or against unilateral debt repudiation without any negotiations at all."[20] However, we see that arbitrators are ready to go well beyond this task.**

58. **In the case of *Abaclat and others v. Argentina*, the tribunal remarked that the dispute did "not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors". That is a fallacious argument. It is because the debtor cannot pay 100 per cent of its debts that debt relief is needed. From an economic point of view, the tribunal asked for the impossible; from a human rights perspective, it pushed the State to let its population down.**

59. **Such decisions will generate further economic problems by virtue of delaying debt restructuring. They also obstruct the restructuring, as they create an incentive among creditors not to agree with the debtor in order to reach a level of sustainable debt, as nobody will be ready to cooperate if some creditors are able to receive 100 per cent of what they are owed. At the end of the day, arbitrators would have to decide whether and to what extent investors that choose not to agree with the majority, but hold out and litigate, are protected. The problem is that in the context of sovereign insolvency, by definition, the debtor cannot fully repay its debts. An expansive protection of investor rights in such contexts would create further liabilities for debtor States, impair their economic recovery and reduce funding for public services giving effect to human rights obligations. It goes without saying that it is not yet a consolidated idea among all arbitrators that bilateral investment treaties cover sovereign bonds, as the case of *Poštová Banka v. Greece* has recently shown.**

60. **While States and the international community are making great efforts to prevent or minimize vulture and holdout litigation, the fact that investment arbitrators seem to be opening a new door for those creditors to deploy their disruptive strategies is, to say the least, disappointing. Even more so if we consider that neither financial law nor human rights law play a meaningful role in investment arbitration. Systemic financial risks need better and well-coordinated responses from global institutions and international law. A deliberative approach is required: investment protection law has to be interpreted in conformity with the rationalities of other law, such as international human rights law and financial regulations required for ensuring debt sustainability, financial stability, equality and social and economic rights.**[20]

61. **An institutional forum that solves debt disputes needs to be based on a broad international consensus. If countries actually think that it would be a good idea that investment arbitrators be in charge of taking the most fundamental decisions during and after financial crises, States should say so openly, but most bilateral investment treaties do not seem to reflect that idea. In fact, bilateral investment treaties using the words "sovereign debt" or "sovereign bonds" are rare and special arrangements for "government securities" and "public debt" are found in a limited (although increasing) number of treaties concluded since the 1990s.**[47] **In this vein, almost all sovereign bonds issued provide for litigation rather than arbitration.**[48]

[47] See Kei Nakajima, "An elusive safeguard with loopholes: sovereign debt and its 'negotiated restructuring' in international investment agreements in the age of global financial crisis", *International Review of Law*, 2016, vol. 2016, No. 3. See also, for example, annex G of the United States-Uruguay bilateral investment treaty (2005); United States-Peru free trade agreement (2006); and Canada-Burkina Faso bilateral investment treaty (signed in 2015 but not yet in force).

[48] See for example Stephen J. Choi and Mitu Gulati, "An empirical study of securities disclosure practice", Tulane Law Review, vol. 80 (2006).

62. **If arbitrators make the interpretation that they have jurisdiction to solve a debt dispute, human rights law must be regarded as applicable law to debtors and creditors alike. To think of areas of our society that are immune from human rights standards is as incorrect as it is dangerous. Sovereign debt restructuring should be subject to the human rights principles of non-discrimination, progressive realization, non-retrogression and ensuring minimum core obligations. Consequently, there is a need to assess if there will be any deterioration of rights and how human rights impacts will interact with each other during the relevant period.[49] Ideally, a human rights impact assessment should be conducted, followed by monitoring. That may also require consideration of intertemporal human rights trade-offs, as expenditure cuts may need to be made to ensure the sustainability of public services in the future. Protecting public services in the short term, while increasing debt, may exacerbate difficulties with human rights compliance later. On the other hand, States also need to consider the longer-term impact of, for example, cuts to education for future generations. When States attempt to address this balance, creditors will need to be flexible.**

63. **International debt disputes should be solved in a transparent, fair and timely manner through an international sovereign debt workout mechanism informed by the Guiding principles on foreign debt and human rights (A/HRC/20/23 and Corr.1) and the Basic Principles on Sovereign Debt Restructuring Processes. The Basic Principles systematized and consolidated the legal principles of public international law, which reflect progressive trends in current practice that corroborate, for example, the principle of sovereign debt sustainability.[50] Investment arbitrators would need very good reasons not to consider these principles if they have to decide on debt disputes with an impact on debt restructuring.**

B. Recommendations

1. Negotiation of investment agreements

64. **Bilateral and multilateral investment agreements should be subject to human rights impact assessments before they are concluded. The Guiding principles on human rights impact assessments of trade and investment agreements (A/HRC/19/59/Add.5) provide guidance to States on how best to ensure that trade and investment agreements are consistent with their obligations under human rights.**

65. **States should ensure that negotiations of investment agreements are conducted in an open and transparent manner, allowing parliamentarians, affected communities and other stakeholders (such as taxpayers) access to all relevant documentation.**

66. **Appropriate consultation procedures and mechanisms should be developed to ensure the right to participation in the drafting, negotiation and approval of international investment agreements.**

[49] Daniel Bradlow, "Can parallel lines ever meet? The strange case of the international standards on sovereign debt and business and human rights", *Yale Journal of International Law*, vol. 41, No. 2 (2016).

[50] See Juan Pablo Bohoslavsky and Matthias Goldmann, "An incremental approach to sovereign debt restructuring: sovereign debt sustainability as a principle of public international law".

2. Content of investment agreements

67. **When negotiating or revising investment agreements, States should ensure that their articles include explicit provisions that refer to the human rights obligations of investors and host and home States.**

68. **Investment agreements should include provisions reaffirming that investors should respect human rights, as set out in international human rights treaties, the Guiding principles on business and human rights and in the ILO Declaration on Fundamental Principles and Rights at Work.**

69. **International investment agreements should exclude investment claims related to debt restructuring disputes. Based on the volume, nature and ramifications of the problems that investment arbitration poses to sovereign debtors and their populations, to creditors and to the international financial system, States should explicitly exclude this possibility, as some bilateral treaties already do.[51] That is the practice followed, for example, by Colombian investment agreements.**

70. **Investment agreements should include, in any case, clauses in relation to the right to regulate economic activities, in particular during times of economic or financial collapse. They should include debt agreements reached in a non-discriminatory manner with supermajorities of creditors.**

71. **Investment agreements should specify that bona fide measures aimed at protecting the human rights of the population and ensuring debt sustainability do not constitute a breach of the agreement and are non-compensable.**

3. Investment dispute settlement

72. **Arbitration tribunals must consider human rights law as applicable law for the interpretation of investment treaties.**

73. **The transparency of investment arbitration should be increased through publishing all details of the dispute and in general holding hearings in public.**

74. **Non-parties to the dispute should have a right to attend arbitration proceedings and affected communities and public interest organizations should have a right to make written presentations and amicus curiae submissions.**

75. **International investment treaties should provide for a robust system of review of awards to reduce arbitrariness.**

76. **Investment agreements should include rules to ensure the independence of appointed arbitrators and require that arbitrators have an adequate knowledge of investment law and international law standards in the field of finance, human rights, labour and the environment.**

77. **Existing financial and bankruptcy law principles should be seriously considered by arbitrators if they consider they have jurisdiction to solve debt disputes. Arbitrators need, in particular, to consider the implications of their awards for the economy of the debtor State, for the rights of the affected population and for the rights of all creditors.**

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[51] See, for example, Peru-Republic of Korea Free Trade Agreement, Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) and United States-Uruguay bilateral investment treaty.